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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-942

FRANK L. RIZZO, *et al.*,
vs.
GERALD G. GOODE, *et al.*,
Petitioners,
Respondents.

HON. JAMES H. J. TATE, *et al.*,
vs.
COUNCIL OF ORGANIZATIONS ON PHILADELPHIA POLICE ACCOUNTABILITY AND RESPONSIBILITY, *et al.*,
Petitioners,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Brief of the American Civil Liberties Union, the Mexican American Legal Defense and Educational Fund, and the Northern California Police Practices Project, as *Amici Curiae*

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I N D E X

	Page
INTEREST OF THE AMICI CURIAE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. Introduction	6
II. The Practical and Constitutional Concerns Against an Unregulated Police	17
III. The Proper Remedy	47
CONCLUSION	60

TABLE OF AUTHORITIES

Cases: Page

Agnello v. United States, 269 U.S. 20 (1925) 37

Alexander v. Hillman, 296 U.S. 222 (1935) 58

Allee v. Medrano, 416 U.S. 802 (1974) 6, 9, 23, 47, 50

Alyeska Pipeline Service Co. v. Wilderness Society, 43 U.S.L.W. 4561 (U.S., May 12, 1975) 39

Bachellar v. Maryland, 397 U.S. 564 (1970) 27

Beck v. Ohio, 379 U.S. 89 (1964) 28, 34, 37

Bell v. Hood, 327 U.S. 678 (1946) 49

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) 30, 42, 49

Bond v. Floyd, 385 U.S. 116 (1966) 50

Bram v. United States, 168 U.S. 532 (1897) 28

Breed v. Jones, 43 U.S.L.W. 4644 (U.S. May 27, 1975) 50

Brinegar v. United States, 338 U.S. 160 (1949) 18

Page

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930) 31

Camara v. Municipal Court, 387 U.S. 523 (1967)..... 7, 31, 34, 37, 50

Chambers v. Florida, 309 U.S. 227 (1940) 7

Chapman v. United States, 365 U.S. 610 (1961) 37

Chimel v. California, 395 U.S. 752 (1969) 36-37

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 37

Cooper v. Aaron, 358 U.S. 1 (1958) 14

Cottonreader v. Johnson, 252 F. Supp. 492 (M.D. Ala. 1966) 52

Council of Organizations on Philadelphia Police Accountability and Responsibility v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973) passim

Cox v. Louisiana, 379 U.S. 536 (1965) 32, 33

Cunningham v. Grenada School District, 11 Race Rel. L. Rep. 1176 (N.D. Miss. 1966) 52

Cupp v. Murphy, 412 U.S. 291 (1973) 18, 35

Davis v. Mississippi, 394 U.S. 721 (1969) 23, 28, 35

	Page
Duncan v. Louisiana, 391 U.S. 145 (1968)	22
Edwards v. South Carolina, 372 U.S. 229 (1963)	29
Elkins v. United States, 364 U.S. 206 (1960)	42
Entick v. Carrington, 19 Howell St. Tr. 1029 (1765)	36, 57
Fowler v. Rhode Island, 345 U.S. 67 (1953)	28
Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970)	53
Goode v. Rizzo, 506 F.2d 542 (3rd Cir. 1974)	passim
Goss v. Lopez, 419 U.S. 565 (1976)	6, 7, 11, 31, 50, 28
Green v. County School Board, 391 U.S. 430 (1968)	53
Greene v. McElroy, 360 U.S. 474 (1959)	32
Gregory v. City of Chicago, 394 U.S. 111 (1969)	32
Guyot v. Pierce, 372 F.2d 658 (5th Cir. 1967)	29
Hague v. C.I.O., 307 U.S. 496 (1939)	50
Hannegan v. Esquire, Inc., 327 U.S. 146 (1946)	32

	Page
Hecht Co. v. Bowles, 321 U.S. 321 (1944)	60
Hess v. Indiana, 414 U.S. 105 (1973)	23
Hicks v. Knight, 10 Race Rel. L. Rep. 1504 (E.D. La. 1965)	52
Holmberg v. Armbrecht, 327 U.S. 392 (1946)	60
Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964), on petition for rehearing, 330 F.2d 55 (5th Cir. 1964)	21, 32
In re Oliver, 333 U.S. 257 (1948)	31
Jackson v. Denno, 378 U.S. 368 (1964)	30
Johnson v. Mississippi, 43 U.S.L.W. 4554 (U.S., May 12, 1975)	50
Johnson v. United States, 333 U.S. 10 (1948)	23, 27, 35
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951)	7, 32
Jones v. United States, 357 U.S. 493 (1958)	37
Katz v. United States, 389 U.S. 347 (1967)	37
Kirby v. Illinois, 406 U.S. 682 (1972)	28
Kunz v. New York, 340 U.S. 290 (1951)	27

	Page
Kusper v. Pontikes, 414 U.S. 51 (1973)	47
Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966)	23, 44, 50, 61
Lemon v. Kurtzman, 411 U.S. 192 (1973)	50, 60
Lewis v. City of New Orleans, 415 U.S. 130 (1974)	23
Lombard v. Louisiana, 373 U.S. 267 (1963)	28, 30
Louisiana v. United States, 380 U.S. 145 (1965)	6
Mancusi v. DeForte, 392 U.S. 364 (1968)	37
Mapp v. Ohio, 367 U.S. 643 (1961)	42
Marbury v. Madison, 1 Cranch 137 (1803)	13, 14, 17, 30
Massiah v. United States, 377 U.S. 201 (1964)	28
Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974)	60
McDonald v. United States, 335 U.S. 451 (1948)	35
Miranda v. Arizona, 384 U.S. 436 (1966)	28
Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960)	60
Monroe v. Pape, 365 U.S. 167 (1961)	49, 50

	Page
Morton v. Ruiz, 415 U.S. 199 (1974)	7, 17, 32
N.A.A.C.P. v. Thompson, 357 F.2d 831 (5th Cir. 1966)	30
Nietmotko v. Maryland, 340 U.S. 268 (1951)	33
North Carolina v. Pearce, 395 U.S. 711 (1969)	30, 53
Norwell v. City of Cincinnati, 414 U.S. 14 (1973)	23
O'Shea v. Littleton, 414 U.S. 488 (1974)	52
Palko v. Connecticut, 302 U.S. 319 (1937)	27
Panama Refining Company v. Ryan, 293 U.S. 388 (1935)	20
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)	17, 21, 28, 30, 33
Peters v. Kiff, 407 U.S. 493 (1972)	30
Pierson v. Ray, 386 U.S. 547 (1967)	20, 41
Preston v. United States, 376 U.S. 364 (1964)	37
Procunier v. Martinez, 416 U.S. 396 (1974)	53
Roaden v. Kentucky, 413 U.S. 496 (1973)	29

	Page
Rochin v. California, 342 U.S. 165 (1952)	28
Scheuer v. Rhodes, 416 U.S. 232 (1974)	14, 41
Schmerber v. California, 384 U.S. 757 (1966)	35
Schneider v. State, 308 U.S. 147 (1939)	27, 29
Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969)	23
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)	7, 34
Screws v. United States, 325 U.S. 91 (1945)	28
Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965)	29, 33
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Slochower v. Board of Higher Education, 350 U.S. 551 (1956)	7, 31
Smith v. Goguen, 415 U.S. 566 (1974)	32, 33
Stanford v. Texas, 379 U.S. 476 (1965)	29, 36, 45
Steffel v. Thompson, 415 U.S. 452 (1974)	51
Stoner v. California, 376 U.S. 483 (1964)	37

	Page
Strauder v. West Virginia, 100 U.S. 303 (1880)	30
Strother v. Thompson, 372 F.2d 654 (5th Cir. 1967)	29
Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973)	23
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)	53, 59
Terminiello v. Chicago, 337 U.S. 1 (1949)	27
Territory of Hawaii v. Anduha, 48 F.2d 171 (9th Cir. 1931)	33
Terry v. Ohio, 392 U.S. 1 (1968)	18, 35, 37, 50
Thornhill v. Alabama, 310 U.S. 88 (1940)	33
Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969)	11
United States v. Calandra, 414 U.S. 338 (1974)	23
United States v. City of Grenada, 11 Race Rel. L. Rep. 1782 (N.D. Miss. 1966)	52
United States v. DiRe, 332 U.S. 581 (1948)	7
United States v. Jeffers, 342 U.S. 48 (1951)	37

Page

United States v. Lee, 106 U.S. 196 (1882) 14, 17

United States v. Loew's Inc., 371 U.S. 38 (1962) 59

United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297 (1972) 7, 35, 36, 37

United States v. United States Gypsum Co., 340 U.S. 76 (1950) 59-60

United States v. Wade, 388 U.S. 218 (1967) 28

Vale v. Louisiana, 399 U.S. 30 (1970) 37

Watson v. City of Memphis, 373 U.S. 526 (1963) 50

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 49

Wilkes v. Wood, 19 Howell St. Tr. 1153, 1167 (1763) 36

Williams v. United States, 341 U.S. 97 (1951) 28

Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965) 52

Wolff v. McDonnell, 418 U.S. 539 (1974) 7, 11, 28, 31, 34, 50, 58

Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968) 27-28, 53

Page

Wood v. Strickland, 43 U.S.L.W. 4293 (U.S., February 25, 1975) 41

Wright v. Georgia, 373 U.S. 284 (1963) 30

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 14, 29, 31

Younger v. Gilmore, 404 U.S. 15 (1971) 53

Ziang Sun Wan v. United States, 266 U.S. 1 (1924) 24

Zwickler v. Koota, 389 U.S. 241 (1967) 51

Constitution and Statutes:

United States Constitution
First Amendment 27, 29, 33
Fourth Amendment ..... passim
Fifth Amendment 28
Sixth Amendment 28
Fourteenth Amendment ..... passim

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42 U.S.C. §1983 ..... 47, 50

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Page

AMERICAN CIVIL LIBERTIES UNION, POLICE POWER AND CITIZENS' RIGHTS (1967) 24, 49

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Page

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E. CRAY, THE BIG BLUE LINE (1967) 24

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Page

W. LAFAVE, ARREST -- THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965) [cited as LAFAVE] 43, 48

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NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, FINAL REPORT: TO ESTABLISH JUSTICE, TO

Page

INSURE DOMESTIC TRANQUILITY (G.P.O. 1969) 42-43, 54

Note, Grievance Response Mechanisms for Police Misconduct, 55 VA. L. REV. 909 (1969) 54

Note, Philadelphia Police Practice and the Law of Arrest, 100 U. PA. L. REV. 1182 (1952) 38, 43

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Page

1967) [cited as NATIONAL CRIME COMMISSION REPORT] 6, 13, 15, 18, 19, 20, 21, 54

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Page

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W. WESTLEY, VIOLENCE AND THE POLICE (1970) 24

J. WILSON, VARIETIES OF POLICE BEHAVIOR (1968) 18

2 L. WROTH & H. ZOBEL (eds.), LEGAL PAPERS OF JOHN ADAMS 141-142 (1965) 36

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE NORTHERN CALIFORNIA POLICE PRACTICES PROJECT, AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nation-wide non-partisan, non-profit membership organization dedicated to securing the constitutional rights of all persons. A principal concern of the ACLU is the pervasive impact of police lawlessness upon the constitutionally protected liberties of a free society. For more than fifty years, the ACLU has engaged in litigation and education which seeks to insure that all agents and agencies of government are governed by the rule of law, and that their conduct conforms to the law. The ACLU's interest in the present cases is based upon the belief that arbitrary exercises of police power and unfettered police discretion cannot be reconciled with constitutional government.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national, non-partisan, non-profit organization established in 1968 to secure and advance the civil rights of Mexican Americans through litigation and education. Since its inception, MALDEF has actively presented legal challenges to many indignities faced by Mexican Americans and has been particularly concerned with the police treatment of members of racial and cultural minorities. MALDEF is interested in these cases for two related reasons. First, its experience has demonstrated the deep and pernicious effects of police illegality upon the lives and spirits of minority people. Second, it is convinced that police treatment of individuals must be effectively regulated by public officials acting responsibly under the law,

and that the limits of police power cannot safely be defined by the impulses of policemen in the field even though political majorities may condone abuses and excesses that fall most harshly on unpopular, politically powerless groups.

The Northern California Police Practices Project is a non-partisan, non-profit organization established in the San Francisco Bay Area of California in 1973 with the objective of developing adequate public accountability of police agencies and police personnel. Its establishment reflected the practical experience of civil-rights litigating organizations that traditional judicial remedies for the security of individual rights against police misconduct are wholly insufficient when widespread and uncontrolled abuses are produced by failures of police organizations to police themselves. Accordingly, the Project's primary efforts have been directed toward the creation of adequate intradepartmental mechanisms for regulating police conduct that may trench on citizens' rights -- efforts that the Project pursues by a program of cooperation with police departments when that is possible, by litigation when it is not. The Project's interest in these cases arises because petitioners' position in this Court is potentially destructive of police accountability in two ways. First, it threatens to undermine the responsibility that some police departments do assume for controlling unconstitutional actions by their officers. Second, it leaves the legal process powerless to stimulate forms of police self-correction which offer the only efficacious safeguard against many varieties of misconduct by policemen.

SUMMARY OF ARGUMENT

1. After extended evidentiary hearings, the District Court found that constitutional violations of citizens' rights by Philadelphia policemen had occurred and would recur with intolerable frequency, and that the Philadelphia Police Department was doing nothing about them. The court thereupon ordered the mildest conceivable form of relief, requiring only that the Department maintain citizen-complaint procedures that would enable the Department -- not the court -- to supervise the Department's officers sufficiently to keep their conduct lawful. Petitioners' attack on this order necessarily and explicitly denies that police officials have any responsibility for controlling their subordinates' obedience to constitutional limitations. Such a position is unacceptable because a regime of uncontrolled police power is inconsistent with the rule of law and with the preservation of constitutional liberties under law.

2. Neither Due Process nor the Fourth Amendment countenances an unregulated exercise of police authority. Armed with the most violent and intrusive powers in civilian society and organized according to a paramilitary model that resists external controls, policemen must be governed effectively by their superiors if these constitutional guarantees are to be respected.

3. When a federal district court is confronted with a record showing frequent constitutional violations by policemen that are condoned and perpetuated by their department's failure to provide adequate

corrective procedures, the court can respond in one of three basic ways. The first is to abdicate its own responsibility for enforcing constitutional rights by permitting the department to do the same. The second is to assume some measure of direct control over the operations of the department -- a remedy which, while not beyond the power of the court in the most extreme situations, should ordinarily be avoided where lesser measures of relief will suffice. The third approach, adopted by the District Court here, is to insist that police supervisory personnel improve internal departmental controls and make them adequate. That is an altogether permissible and appropriate approach, and was well within the equitable remedial powers of the District Court in the present cases.

ARGUMENT

I. INTRODUCTION

The subject of this lawsuit is official lawlessness; the object of the lawsuit, to assure governmental accountability. At issue is the power of the federal judiciary to respond effectually to "a persistent pattern of police misconduct." 1/ The ultimate question -- of paramount importance because "if America is to meet the challenge of crime . . . [i]t must recognize that the government of a free society is obliged to act not only effectively but fairly" 2/ -- is whether the Constitution of the United States will tolerate un unregulated police.

Policemen combat crime; crime is a serious problem; and there therefore arise serious pressures and seductive blandishments to give policemen "untrammeled power to act unilaterally, unhampered by rules" 3/ and freed of the "standards and restraints" 4/

1/ Allee v. Medrano, 416 U.S. 802, 815 (1974).

2/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 291 (G.P.O. 1967) [hereinafter cited as NATIONAL CRIME COMMISSION REPORT].

3/ Goss v. Lopez, 419 U.S. 565, 580 (1975).

4/ Louisiana v. United States, 380 U.S. 145, 153 (1965).

that the Constitution imposes upon all governmental action 5/ "so as to assure that . . . [such action] is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial" 6/ of individual rights. The siren song is not new; and we are confident that the Court will, as always heretofore, 7/ perceive its dissonance with the most rudimentary principles of civilization. "Civilization involves subjection of force to reason, and the agency of this subjection is law." Pound, The Future of Law, 47 YALE L. J. 1, 13 (1937).

As amici, we shall not burden the Court by repeating the parties' summaries of the evidence received by the District Court and evaluated by that court after "[g]iving the police the benefit of the doubt" at every point, 357 F. Supp. at 1298, and consistently according petitioners "the full benefit of the presumption that the police officers acted properly," id. at 1292.

5/ E.g., Goss v. Lopez, 419 U.S. 565 (1975); Wolff v. McDonnell, 418 U.S. 539 (1974); Camara v. Municipal Court, 387 U.S. 523 (1967); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Slochower v. Board of Higher Education, 350 U.S. 551 (1956); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

6/ Morton v. Ruiz, 415 U.S. 199, 231 (1974).

7/ See, e.g., United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 318-321 (1972); United States v. Di Re, 332 U.S. 581, 595 (1948); Chambers v. Florida, 309 U.S. 227, 240-241 (1940).

Suffice it to say that a unanimous Court of Appeals, making its own "review of the lengthy record," 506 F.2d at 547, approved the District Court's "voluminous findings of fact," id. at 545, with a proper awareness "of the weight which must be given to the findings of a trial judge which are dependent upon and interwoven with intensely local conditions and circumstances," id. at 547. 8/ The Court of Appeals accordingly affirmed the District Court's conclusions that, "under existing circumstances, violations of constitutional rights by [the Philadelphia] police do occur in an unacceptably high number of instances; [9/] that, in the absence of changes in procedures, such violations are likely to continue to occur," 357 F. Supp. at 1321; that these violations occur "with such frequency that 'they cannot be dismissed as rare isolated incidents; and that little or nothing

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8/ The Court of Appeals also properly noted that District Judge Fullam was familiar with other lawsuits challenging Philadelphia Police Department practices. 506 F.2d at 547 n. 6.

9/ "The evidence discloses that violations of legal and constitutional rights of citizens by the police are most widespread in the following areas of police activity:

"(1) Arrests 'for investigation'; (2) Treatment of citizens who question or criticize what the police are doing in a particular instance; (3) Charges of resisting arrest, when the arrest was unlawful in the first place; (4) Extreme overreaction to actual or reported assaults upon policemen." (357 F. Supp. at 1318.)

is done by the city authorities to punish such infractions, or to prevent their recurrence,'" 506 F.2d at 545. On the basis of these findings and conclusions, and because "revision of procedures for handling citizen complaints is a necessary first step in attempting to prevent future abuses," 357 F. Supp. at 1321, the District Court ordered moderate and minimal relief, eschewing more extreme remedies and requiring only that the Philadelphia Police Department maintain such citizen-complaint procedures as were necessary to enable it to police itself, thereby obviating the necessity for further judicial intervention into police management or routine police activities.

Although there can be "no contention that this decree would interfere with law enforcement by restraining the police from engaging in conduct that would be otherwise lawful," Allee v. Medrano, 416 U.S. 802, 814 (1974), petitioners assail its affirmance by the Court of Appeals as an "abrasive, unmanageable and unwise intrusion into police administration." 10/ That submission contains, in petitioners' words, a singular "irony," 11/ inasmuch as the only thing done by the District Court's decree is to place responsibility for controlling the Philadelphia Police Department precisely where the petitioners say it belongs -- in the hands of police administrators themselves. Far from "assuming control over a major aspect of

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10/ Brief for Petitioners, p. 44.

11/ Brief for Petitioners, p. 38.

the operations of the Philadelphia Police Department," 12/ the courts below have merely insisted that the Department control itself. 13/

12/ Brief for Petitioners, p. 17 (subtitle).

13/ The decisions below hardly make it "'a tort for the government to govern.'" (Brief for Petitioners, p. 35.) They hold rather that it is a remediable constitutional wrong for governing police officials to refuse to govern when the men under their command commit an unacceptably high number of constitutional violations for want of governance. Petitioners' position in this Court makes clear that the issue in this case is not how the Philadelphia Police Department should discipline its troops to observe the constitutional rights of citizens, but whether the Department is obligated at all to undertake to do so. Petitioners deny any such obligation (Brief for Petitioners, p. 39), as indeed they must in order to defend their practice of excluding the protection of constitutional rights from the regimen of internal police discipline. Their "procedures are geared to handle infractions of police rules and regulations, yet these rules and regulations are not framed to cover specific violations of the legal and constitutional rights of civilians." 357 F. Supp. at 1320; see also 506 F.2d at 545. In this setting, the question is surely not whether "the district courts can suspend the power and discretion of local administrators and assume . . . [the latters'] power" (Brief for Petitioners, p. 36), but whether the district courts can insist upon the responsible assumption of "power and discretion" by "local administrators."

Petitioners are therefore left to stand upon the ultimate proposition that "[t]he police have absolutely no duty to provide a quasi-judicial tribunal to conduct adversary hearings for violations of constitutional rights" by policemen. 14/ When stripped of its hyperbole, 15/ this

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14/ Brief for Petitioners, p. 39.

15/ The procedures ordered by the District Court for processing citizens' complaints are no more "quasi-judicial" or "adversary" than those which this Court has required of such diverse functionaries as prison administrators, local school officials, and public-housing managers. Wolff v. McDonnell, 418 U.S. 539 (1974); Goss v. Lopez, 419 U.S. 565 (1975); Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969). Throughout petitioners' brief there runs an undercurrent of objection to the detailed nature of the complaint procedures, to their form (as a departmental directive), and to some of their specific provisions. Even assuming that such objections are open under the two Questions Presented in the petition for certiorari and that they are cognizable within the proper scope of appellate review of the District Court's remedial discretion (see page 59 infra), they are both unfounded and unfair. In its substantive disposition of this case, the District Court merely ordered the petitioners "to submit to this Court for its approval a comprehensive plan for improving the handling of citizen complaints alleging police misconduct, in conformity with the views expressed in the Opinion of this Court . . . ." 357 F. Supp. at 1322. The "views" in question included the suggestion

proposition amounts to saying flatly that police departments have no obligation to supervise their officers to obey the Constitution -- that they may recklessly and unrestrainedly despatch thousands of men armed with super-ordinary powers and directed to take millions of actions that

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that certain very general "guidelines" be "carefully considered" by the petitioners in their "formulation" of complaint procedures -- guidelines that the District Court sketched in a paragraph. See 357 F. Supp. at 1321. The final form of the departmental "directive" incorporated in the District Court's decree was the product of the petitioners' subsequent drafting, with modifications by the court. It is markedly inappropriate, therefore, for petitioners to seize upon the specific character of the directive to portray this case as one in which the District Court undertook to write a detailed code of regulations for the Philadelphia Police Department. The court merely worked with the material that the petitioners submitted to it; and, if there is some way in which a highly detailed plan submitted to a court by a party can be made less detailed in the course of the court's review, we have never seen such a thing happen in school-desegregation litigation, employment-discrimination litigation, prisoners'-rights litigation, or any other sort of injunctive litigation in which we have been involved.

"can affect in some way someone's dignity, or self-respect, or sense of privacy, or constitutional rights," 16/ while leaving the constitutional discipline of those men and any correction of their constitutional infractions to be handled on an ad hoc basis by "the courts." 17/

Such a view of governmental responsibility -- or rather irresponsibility -- involves an extraordinary inversion of the American system of constitutional government under law. Petitioners complain that "the District Court attempted to place elsewhere [i.e., upon the command structure of the police department] the very duty which this Court has said rests with the courts [i.e., to assure that the police function within the Constitution]." Brief for Petitioners, p. 39. This is to read Marbury v. Madison, 1 Cranch 137 (1803), as though its proclamation of "the judiciary's fundamental right to review the unconstitutional actions of coordinate branches of government" (Brief for Petitioners, p. 21) meant that only the judiciary is responsible for enforcing the Constitution -- that executive officials are free to run their departments heedless of the Constitution and to leave the resulting mess to be cleaned up by the courts through whatever post hoc compensatory or restitutionary remedies judges may be able to enforce against the executive's subordinates. That is obviously not what Marbury holds or implies.

16/ NATIONAL CRIME COMMISSION REPORT 91.

17/ Brief for Petitioners, p. 39.

To the contrary, Chief Justice Marshall's answers to the three distinct questions decided in Marbury make clear that the Constitution speaks directly and independently to both executive officers and the courts, obligating the former to manage their affairs consistently with fundamental law, and empowering the latter to enforce this obligation in cases where executive derelictions give rise to justiciable controversies. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 243-249 (1974). "Every state . . . executive . . . officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, 'to support this Constitution.' Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' 'anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State . . . .'" Cooper v. Aaron, 358 U.S. 1, 18 (1958).

Police officials too are subject to that responsibility. 18/ When they are faithless to it, the extensive, drastic forces that our society has necessarily and properly entrusted to policemen degenerate into instruments of "naked and arbitrary power" 19/ that threaten the very fabric of democracy.

18/ "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it." United States v. Lee, 106 U.S. 196, 220 (1882).

19/ Yick Wo v. Hopkins, 118 U.S. 356, 366 (1886).

"Since a principal function of police is the safeguarding of democratic processes, if police fail to conform their conduct to the requirements of law, they subvert the democratic process and frustrate the achievement of a principal police function. It is for this reason that high priority must be given for ensuring that the police are made fully accountable to their police administrator and to the public for their actions." (AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE URBAN POLICE FUNCTION, §5.1 (Approved Draft, 1973) [hereinafter cited as A.B.A. STANDARDS].)

It is for the same reason that adequate and effective police-administered self-corrective processes are "an absolute necessity" 20/ of democratic and constitutional

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20/ NATIONAL CRIME COMMISSION REPORT 103. See also A.B.A. STANDARDS §5.4; NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 163 (G.P.O. 1968); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT: POLICE 469-494 (G.P.O. 1973) [hereinafter cited as CRIMINAL JUSTICE STANDARDS REPORT]; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 29 (G.P.O. 1967) [hereinafter cited as POLICE TASK FORCE REPORT].

government, and that judicial relief is available and appropriate when police "procedures for handling civilian complaints and for enforcement of police discipline related to civilian complaints is totally inadequate," 357 F. Supp. at 1318; see also 506 F.2d at 548, to restrain individual police officers from violating "the legal and constitutional rights of citizens . . . entirely too frequently," 357 F. Supp. at 1318.

Our submissions in this brief are, summarily (1) that the Constitution commands the maintenance of effective controls over police practices which may otherwise trench upon citizens' constitutional rights, and (2) that courts enforcing the Constitution are authorized to require a police department to maintain such controls where the department's failure to do so, despite persistent constitutional violations by its officers, is demonstrated. We first discuss the impermissibility of an uncontrolled police (Part II, infra), and then the propriety of the relief decreed below against that evil (Part III, infra).

II. THE PRACTICAL AND CONSTITUTIONAL CONCERNS AGAINST AN UNREGULATED POLICE

Although, as we shall shortly see, 21/ every agency of American government is constrained by the rule of law 22/ -- "the only supreme power in our system of government," United States v. Lee, 106 U.S. 196, 220 (1882) -- there are particularly intense practical and constitutional reasons why police agencies have "the responsibility . . . to employ procedures that conform to the law." Morton v. Ruiz, 415 U.S. 199, 232 (1974). The practical reasons seem self-evident but will bear a brief recapitulation:

First, "the authorization and the obligation to use force on the basis of no more than reasonable belief that the undertaken action is justified is the exclusive monopoly of the police. No other official in any branch of civil government has this right or this duty." E. BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY 34 (DHEW Publication No. (HSM) 72-9103, reprinted 1972) [hereinafter cited as BITTNER]. Policemen have and must be given violent means to do their job: the means to arrest and search and seize, to strike and maim and kill. As Justice

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21/ Pages 31-32 infra.

22/ E.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972). See Marbury v. Madison, 1 Cranch 137, 163 (1803): "The government of the United States has been emphatically termed a government of laws, and not of men."

Jackson reminded us shortly after his return from Nuremberg, "One need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of . . . [the] rights [against uncontrolled exercises of such powers] to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded . . . [invasions] by the police." Brinegar v. United States, 338 U.S. 160, 180-181 (1949)(dissenting opinion). Even the most ordinary and least intrusive of police powers may involve a "'severe, though brief, intrusion upon cherished personal security,'" Cupp v. Murphy, 412 U.S. 291, 295 (1973), a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment . . . ." Terry v. Ohio, 392 U.S. 1, 17 (1968). See NATIONAL CRIME COMMISSION REPORT 91, quoted in text at note 16 supra.

Second, the range of police activities is exceedingly broad 23/ and therefore exceedingly difficult for any agency outside of the police themselves to encompass or control. 24/

23/ See, e.g., NATIONAL CRIME COMMISSION REPORT 91-99; POLICE TASK FORCE REPORT 13-16; A.B.A. STANDARDS 36-78; J. WILSON, VARIETIES OF POLICE BEHAVIOR (1968); Danzig, Toward the Creation of a Complementary, Decentralized System of Criminal Justice, 26 STAN. L. REV. 1 (1973).

24/ See, e.g., Goldstein, Administrative Problems in Controling [sic] the Exercise of Police Authority, 58 J. CRIM. L., CRIM. & POL. SCI. 160 (1967); Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 386-387 (1974).

Third, throughout this range, individual police officers are customarily "left to function on . . . [their] own," 25/ with no restraints or guides but their impulses, their "street smarts," and whatever policies they themselves may choose to make for their own governance. 26/ Professor Kenneth Culp Davis has said that

> "[t]he police are among the most important policy-makers of our entire society. . . . [T]hey make far more discretionary determinations in individual cases than any other class of administrators; I know of no close second." (K. DAVIS, DISCRETIONARY JUSTICE 222 (1969)[hereinafter cited as DAVIS].)
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> "No other federal, state, or local agency, so far as I know, delegates so much power to subordinates. No other agency, so far as I know, does so little supervising of vital policy determinations which directly involve justice or injustice to individuals. And no other agency, so far as I know, makes policy which in such a large degree is illegal or of doubtful legality." (DAVIS 88.)

25/ Goldstein, Police Policy Formulation: A Proposal for Improving Police Performance, 65 MICH. L. REV. 1123, 1128 (1967).

26/ The National Crime Commission put the matter simply: "law enforcement policy is made by the policeman." NATIONAL CRIME COMMISSION REPORT 10.

Some of this discretion is doubtless desirable; 27/ some, inevitable; but much of its expansive growth is now widely recognized as excessive 28/ -- the product of higher-echelon police officials' abnegation of the responsibility to see that discretion is "canalized within banks that keep it from overflowing," Panama Refining Company v. Ryan, 293 U.S. 388, 440 (1935) (dissenting opinion of Justice Cardozo).

Fourth, the police are characteristically mobilized in a command structure that is highly resistant to external controls. 29/ This tightly regimented form of organization permits swift and relatively effective enforcement of such rules and standards for conduct as the police supervisory personnel may choose to impose upon their subordinates, while at the same time largely isolating the individual policeman from the values -- and insulating him from the constraints -- of the

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27/ See Pierson v. Ray, 386 U.S. 547, 555 (1967).

28/ See, e.g., NATIONAL CRIME COMMISSION REPORT 103-106; POLICE TASK FORCE REPORT 16-18; A.B.A. STANDARDS 116-131, and authorities collected at 119 nn. 117-119; Goldstein, Administrative Problems in Controling [sic] the Exercise of Police Authority, 58 J. CRIM. L., CRIM. & POL. SCI. 160 (1967); Igleburger & Schubert, Policy Making for the Police, 58 A.B.A.J. 307 (1972).

29/ Petitioners' self-conception can be gleened from their description of the police as "a quasi-military organization which operates in accordance with a basic command structure." Brief for Petitioners, p. 39.

broader society. 30/

Fifth, notwithstanding this hierarchic organization, a great deal of police activity that affects citizens most immediately and intrusively -- that is, routine patrol work on the streets -- is not and cannot be directly supervised or seen by superior officers. Unlike firemen who work in teams or soldiers who are led into battle by commanding officers, policemen ordinarily operate alone or in pairs; 31/ and what they do is often of greater visibility to the citizens whom they encounter than to the policemen's own superiors. 32/ The invisibility that cloaks much highly discretionary police behavior leaves room for every form of arbitrariness and prejudice, and furnishes a "fertile breeding ground . . . for such temptations." 33/ See Papachristou v. City of Jacksonville, 405 U.S. 156, 170-171 (1972); NATIONAL CRIME COMMISSION REPORT 115. As Professor Herman Goldstein -- a former assistant to Chicago's Superintendent of Police -- has written:

30/ See, e.g., J. SKOLNICK, JUSTICE WITHOUT TRIAL -- LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 9-14, 182-245 (1966) [hereinafter cited as SKOLNICK]; BITTNER 52-62.

31/ See, e.g., NATIONAL CRIME COMMISSION REPORT 115.

32/ See, e.g., BITTNER 38, 59.

33/ Hornsby v. Allen, 326 F.2d 605, 609 (5th Cir. 1964), on petition for rehearing, 330 F.2d 55 (5th Cir. 1964).

"[T]he criteria that are employed [by individual policemen to determine their actions] emerge largely in response to a variety of pressures . . . and are therefore not carefully developed . . . . And such indefensible criteria as the status or characteristics of the complainant, the victim, or the offender may often be among the most seriously weighed factors, since an officer, left to function on his own, understandably tends to respond to a given situation on the basis of his personal norms regarding individual or group behavior." (Goldstein, Police Policy Formulation: A Proposal for Improving Police Performance, 65 MICH. L. REV. 1123, 1127-1128 (1967).

In this setting, then -- under the conditions of the "actual systems" 34/ within which policemen function -- police departmental self-regulation is indispensable to the maintenance of public security against the ever-present possibility of police misconduct and lawlessness. Fortunately, most police work is competent and professional, respecting as it reinforces the laws that secure a free and orderly society. But over long periods

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34/ Duncan v. Louisiana, 391 U.S. 145, 149 n. 14 (1968).

of time, as thousands of policemen "engaged in the often competitive enterprise of ferreting out crime" 35/ confront hundreds of thousands of citizens in millions of encounters, there will expectably occur some larger or smaller number of excesses and abuses. The frequency with which this Court is obliged to decide, every year, that policemen have violated someone's constitutional rights 36/ serves as a constant reminder that such abuses do occur 37/ -- particularly when it is recalled that

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35/ Johnson v. United States, 333 U.S. 10, 14 (1948).

36/ Consider, during the Court's last complete Term, Norwell v. City of Cincinnati, 414 U.S. 14 (1973); Hess v. Indiana, 414 U.S. 105 (1973); United States v. Calandra, 414 U.S. 338 (1974); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Allee v. Medrano, 416 U.S. 802 (1974). Specific incidents of abuse (whether arising from oppressive purposes or extremely poor judgment) like Norwell preponderate, of course; but widespread patterns and practices of police lawlessness (as in Allee) are not unknown. See, e.g., Davis v. Mississippi, 394 U.S. 721 (1969); Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973); Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

37/ See also, e.g., NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 158-159 (G.P.O. 1968); PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, REPORT: TO SECURE THESE RIGHTS 25 (1947); UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT: MEXICAN AMERICANS AND THE ADMINISTRATION OF

the cases of police abuse which come to court in any form are the tip of the iceberg, 38/ and that the ones which reach

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37/ continued
JUSTICE IN THE SOUTHWEST 2-13 (G.P.O. 1970); UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT: LAW ENFORCEMENT 20-49, 62-68 (G.P.O. 1965); UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT: JUSTICE 5-44 (G.P.O. 1961); AMERICAN CIVIL LIBERTIES UNION, POLICE POWER AND CITIZENS' RIGHTS 6-13 (1967); AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, LAW ENFORCEMENT: THE MATTER OF REDRESS (Institute of Modern Legal Thought 1969); P. CHEVIGNY, POLICE POWER -- POLICE ABUSES IN NEW YORK CITY (1969) [hereafter cited as CHEVIGNY]; R. CLARK, CRIME IN AMERICA 120-121, 143-145 (Pocket Books ed. 1971); E. CRAY, THE BIG BLUE LINE (1967); A. MORALES, ANDO SANGRANDO -- A STUDY OF MEXICAN AMERICAN POLICE CONFLICT (1972); A. REISS, THE POLICE AND THE PUBLIC (1971); SKOLNICK passim; A. TREBACH, THE RATIONING OF JUSTICE 5-6 (1964); W. WESTLEY, VIOLENCE AND THE POLICE (1970); METCALF REPORT ON THE MISUSE OF POLICE AUTHORITY IN CHICAGO (Chicago Defender, July 1973); Bliss, Police Brutality in Chicago, Bad Apples on the Beat, 218 THE NATION 171 (1974); Police Brutality (Chicago Tribune, November 1973).

38/ See, e.g., Goldstein, Administrative Problems in Controling [sic] the Exercise of Police Authority, 58 J. CRIM. L., CRIM. & POL. SCI. 160, 168 (1967):

> "Judicial control is . . . limited to the review of only those aspects of police functioning that relate to acquiring evidence in cases in which there is an intention to initiate a prosecution. Such

this Court are the tip of the tip of the

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> cases represent but a very small segment of the total number of actions in which the police are typically engaged. For every incident in which a police officer exerts his authority as the first step in a process leading to a prosecution, he handles a multitude of other incidents in which he checks out suspicious circumstances, separates combatants, orders people to disperse, or in some other manner uses his powers without effecting an arrest. And even if an arrest is made, it is not always indicative of a desire to prosecute. In many cases it is intended only to serve some other more short-lived objective, such as the harassment of prostitutes or the safeguarding of drunks."

See also L. TIFFANY, D. McINTYRE & D. ROTENBERG, DETECTION OF CRIME 183-199 (1967) [hereafter cited as TIFFANY, McINTYRE & ROTENBERG]; LaFave, Improving Police Performance Through the Exclusionary Rule, 30 MO. L. REV. 391, 421-455 (1965); LaFave & Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 MICH. L. REV. 987, 1008-1011 (1965); Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665, 720-724 (1970) [hereafter cited as Oaks]. Professor Egon Bittner has observed that

> "it is exceedingly rare that police actions involving the use of force are actually reviewed and judged by anyone at all." (BITTNER 38.)

iceberg.[39/]

Some abuses will doubtless occur under any system of police management, but their numbers will be larger or smaller depending on the vigilance and the efficiency with which police administrative personnel impose a constitutional discipline upon their troops. The failure of top police department administrators to provide effective systems of self-regulation inevitably condones and encourages police excesses which are beyond the power of the law to control, [40/] and confers enormous powers upon individual policemen -- powers unparalleled in our society in their immediacy, intrusiveness, and physical violence -- without the restraining supervision that is necessary to assure responsibility and lawfulness in their use. We cannot improve here upon the conclusions of Professor Goldstein:

> "[T]he high value which our society places on individual rights requires that there not only be limitations on the authority exercised by governmental agencies, but that there be effective controls to assure that such power is not exceeded or abused. The need for controls is especially acute with the police, for their authority -- to arrest, to detain, to search, and to use force -- is unique among governmental powers in the

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39/ See, e.g., Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N.Y.U. L. REV. 785, 786-790 (1970).

40/ See pages 37-45 infra.

> degree to which it is disruptive of freedom, invasive of privacy, and sudden and direct in its impact upon the individual." (Goldstein, Administrative Problems in Controling [sic] the Exercise of Police Authority, 58 J. CRIM. L., CRIM. & POL. SCI. 160, 161 (1967).)

It would be surprising if the Constitution of a free society were unconcerned with these problems. Ours unmistakably is not. One of its greatest functions is to maintain the "fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." Johnson v. United States, 333 U.S. 10, 17 (1948). Among the Constitution's high instruments for this purpose are the guarantees of the Bill of Rights and the Fourteenth Amendment. Several of these guarantees manifestly contemplate that police powers must be kept under control if "ordered liberty" [41/] is to survive. [42/] We shall come to the most immediately relevant of the guarantees in a moment. However, it is important to note three points at the outset.

41/ Palko v. Connecticut, 302 U.S. 319, 325 (1937).

42/ The First Amendment imposes restrictions upon police interference with exercises of free speech, e.g., Bachellar v. Maryland, 397 U.S. 564 (1970); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Kunz v. New York, 340 U.S. 290 (1951); Terminiello v. Chicago, 337 U.S. 1 (1949); Schneider v. State, 308 U.S. 147 (1939); cf. Wolin v. Port of New York Authority,

First, underlying all of the specific guarantees of constitutional liberty and uniting them as a common theme is "protection of the individual against arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974); see also, e.g., Goss v. Lopez, 419 U.S. 565, 572-576 (1975); Papachristou v. City of Jacksonville, 405 U.S. 156, 162-171 (1972).

42/ continued

392 F.2d 83 (2d Cir), cert. denied, 393 U.S. 940 (1968); the Fourth Amendment constrains them against unreasonable searches and seizures, e.g., Davis v. Mississippi, 394 U.S. 721 (1969); Beck v. Ohio, 379 U.S. 89 (1964); the Fifth and Sixth Amendments set limits upon their extraction of confessions, e.g., Miranda v. Arizona, 384 U.S. 436 (1966); Ziang Sun Wan v. United States, 266 U.S. 1 (1924); Bram v. United States, 168 U.S. 532 (1897), and their pursuit of other investigative procedures that may overreach uncounseled suspects, e.g., United States v. Wade, 388 U.S. 218 (1967); Massiah v. United States, 377 U.S. 201 (1964), who have a right to counsel, see Kirby v. Illinois, 406 U.S. 682 (1972); the Due Process Clause forbids them to brutalize citizens, whether for investigative purposes, e.g., Rochin v. California, 342 U.S. 165 (1952); Williams v. United States, 341 U.S. 97 (1951), or for punitive ones, see, e.g., Screws v. United States, 325 U.S. 91 (1945); and the Equal Protection Clause forbids them to enforce policies of racial or other invidious discrimination, see, e.g., Lombard v. Louisiana, 373 U.S. 267 (1963); Fowler v. Rhode Island, 345 U.S. 67 (1953).

> "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." Yick Wo v. Hopkins, 118 U.S. 356, 369-370 (1886).

Second, without scrupulous adherence to the rule of law and maintenance of efficacious mechanisms to make it work in the daily encounters of governmental officers and citizens, no guarantee of civil liberty is worth the paper it is written on. First Amendment freedom of speech, for example, is as much abridged when policemen disperse peaceful demonstrators, 43/ or "bust" a pamphleteer, 44/ or confiscate books 45/ or films, 46/ or simply harass those whose speech they disapprove, 47/ as when these persons are prosecuted and convicted or these objects held forfeit by a court of law. Equal protection of the laws is as much denied when policemen use a club as

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43/ See, e.g., Edwards v. South Carolina, 372 U.S. 229 (1963); Guyot v. Pierce, 372 F.2d 658 (5th Cir. 1967).

44/ See, e.g., Schneider v. State, 308 U.S. 147 (1939); Strother v. Thompson, 372 F.2d 654 (5th Cir. 1967).

45/ See, e.g., Stanford v. Texas, 379 U.S. 476 (1965).

46/ See, e.g., Roaden v. Kentucky, 413 U.S. 496 (1973).

47/ See, e.g., Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965).

when they use a court to enforce discriminatory policies. 48/ But unless regularity and visibility of police activity are assured, police violations of these and every other constitutional right will go unseen and unchecked, for the simple reason that no one can know what policemen in the field are doing or when they are abusing their authority. Not only is it true that "the rule of law implies equality and justice in its application," Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972), but it is also true that equality and justice cannot be preserved where relaxation of the rule of law invites and then masks over arbitrary, uncontrolled police behavior.

Third, "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971), quoting Marbury v. Madison, 1 Cranch 137, 163 (1803). "[E]very prohibition implies the existence of rights," Strauder v. West Virginia, 100 U.S. 303, 310 (1880); and the prohibitions of the Constitution assume and require that adequate procedures will be provided to prevent and remedy violations of those rights. See, e.g., Peters v. Kiff, 407 U.S. 493 (1972); North Carolina v. Pearce, 395 U.S. 711 (1969); Jackson v. Denno, 378 U.S. 368 (1964).

48/ See, e.g., Lombard v. Louisiana, 373 U.S. 267 (1963); Wright v. Georgia, 373 U.S. 284 (1963); N.A.A.C.P. v. Thompson, 357 F.2d 831 (5th Cir. 1966).

Two constitutional provisions are particularly implicated by the demonstrated failure of the Philadelphia Police Department to provide such procedures and by the resulting discontrol of individual police officers, which has the "practical effect of . . . [leaving citizens] subject to the discretion of the official in the field" 49/ and of permitting field officers arbitrarily to violate the rights of Philadelphia residents with impunity. The first is the Due Process Clause of the Fourteenth Amendment; the second, the Fourth Amendment's prohibition against unreasonable searches and seizures.

(1) Consistently with the rule of law that is fundamental to Due Process, 50/ no agency or agent of an American government may arbitrarily deprive a citizen of life, liberty or property. See, e.g., Goss v. Lopez, 419 U.S. 565, 572-576 (1975); Wolff v. McDonnell, 418 U.S. 539, 588 (1974); Slochower v. Board of Higher Education, 350 U.S. 551, 559 (1956); In re Oliver, 333 U.S. 257, 278 (1948). For "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). These concepts of "due process in the primary sense," Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 681 (1930) are commonly understood today to forbid govern-

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49/ Camara v. Municipal Court, 387 U.S. 523, 532 (1967).

50/ See note 22 supra.

ment officials' taking away even a man's second-class mailing privileges, or his security clearance, or his liquor license, except pursuant to orderly and well-regulated procedures prescribing standards for the officials' action and assuring its consistency and lawfulness. Hannegan v. Esquire, Inc., 327 U.S. 146, 156-159 (1946); Greene v. McElroy, 360 U.S. 474, 507 (1959); Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir. 1964), on petition for rehearing, 330 F.2d 55 (5th Cir. 1964). A tolerable degree of administrative flexibility is, of course, permitted; but this "doctrine . . . never has been carried so far as to permit administrative discretion to run riot." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 138 (1951)(opinion of Justice Burton, announcing the judgment of the Court). Cf. Morton v. Ruiz, 415 U.S. 199, 231-236 (1974).

If this much be established, is it then possible that police officers can be empowered to intrude upon the lives, liberties and properties of countless citizens -- armed with the most drastic instruments of force known to civilian society -- and to use those instruments as the individual officer may choose, without a semblance of control by his superiors over his too often invisible actions? We submit that the question answers itself "under our system of democratic government, [in which] lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat." Gregory v. City of Chicago, 394 U.S. 111, 120 (1969) (concurring opinion of Justice Black), approved in Smith v. Goguen, 415 U.S. 566, 575 (1974); see also Cox v. Louisiana, 379 U.S. 536, 579 (1965)(concurring opinion of Justice Black), quoted in

Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965); Papachristou v. City of Jacksonville, 405 U.S. 156, 166-171 (1972); Territory of Hawaii v. Anduha, 48 F.2d 171, 173 (9th Cir. 1931). A policeman's decision forcibly to intrude upon the cherished liberties of a free people may not be left to every officer's unconfined, unguided and unreviewed discretion, but is required by Due Process to be governed by reasonably effective restraints and controls. 51/ Due Process therefore does require a police department to provide an adequate tribunal for the hearing and correction of police abuses (compare Brief for Petitioners, p. 39): a procedure that is sufficient to provide and enforce standards for the lawful and constitutional conduct of police operating personnel. "Where, as here, there are no standards governing the exercise of the discretion granted . . . [to individual officers], the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972).

51/ As Smith v. Goguen and Shuttlesworth demonstrate, a concern for controlling undue police discretion has emerged as one of the principal bases of the void-for-vagueness doctrine. See 415 U.S. at 572-576; 382 U.S. at 90-91. The same concern has long been reflected in this Court's First Amendment decisions. See, e.g., Cox v. Louisiana, 379 U.S. 536, 557-558 (1965); Niemotko v. Maryland, 340 U.S. 268, 271-272 (1951); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).

And "[e]ven in applying permissible standards, officers of a State cannot . . . [trench upon a citizen's vital interests] when there is no basis for their finding that he fails to meet these standards or when their action is invidiously discriminatory." Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). If these rudimentary precepts are to have any meaning on the streets of Philadelphia, the people of that City are entitled to have their police department control its officers by "those minimum procedures appropriate under the circumstances and required under the Due Process Clause to insure that . . . [their rights are] not arbitrarily abrogated," Wolff v. McDonnell, 418 U.S. 539, 557 (1974). 52/

(2) "The basic purpose of . . . [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528 (1967). That Amendment does not countenance regimes of law enforcement under which "the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." Beck v. Ohio, 379 U.S. 89, 97 (1964). Rather, the central function of the Amendment is precisely to restrain police discretion in the exer-

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52/ See also Davis, Legal Control of the Police, 52 TEXAS L. REV. 703, 708 (1974): "Any administrator with unguided discretionary power violates due process if he fails to confine and structure his discretion to the extent required to avoid unnecessary arbitrariness in the choices made."

cise of the powers of search and seizure,53/ see, e.g., McDonald v. United States, 335 U.S. 451, 455-456 (1948); Johnson v. United States, 333 U.S. 10, 13-17 (1948), so as to prevent "wholesale intrusions upon the personal security of our citizenry," Davis v. Mississippi, 394 U.S. 721, 726 (1969); and see Cupp v. Murphy, 412 U.S. 291, 294 (1973)(dictum). For "[t]he historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 317

53/ Most of the variety of police practices shown by this record and found unconstitutional by the District Court -- investigative detentions, arrests, physical maulings, etc. -- are obviously either themselves "searches" or "seizures" in constitutional contemplation, Cupp v. Murphy, 412 U.S. 291, 294-295 (1973); Terry v. Ohio, 392 U.S. 1, 16-20 (1968), or the means of conducting "searches" or "seizures" in the Fourth Amendment sense, see Schmerber v. California, 384 U.S. 757, 768 (1966). "The manner in which . . . [a] search and seizure . . . [are] conducted is, of course, as vital a part of the inquiry as whether they . . . [are] warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." Terry v. Ohio, supra, 392 U.S. at 28-29. Similarly, the major part of the gamut of commonly reported police abuses, see note 37 supra, plainly implicate the Fourth Amendment guarantee against unreasonable searches and seizures.

(1972). 54/

It is as a check upon executive discretion that the Fourth Amendment requires "'the police . . ., whenever practicable, [to] obtain advance judicial approval of searches and seizures through the warrant procedure.'" Chimel v. California, 395

54/ The Eastern District case concluded that not even the President could be trusted with unchecked discretion to determine whether and when the domestic security of the United States justified invasions of the privacy of citizens. The case thus stands in the great tradition of Entick v. Carrington, 19 Howell St. Tr. 1029 (1765), and the cognate judgments of the Grenville Ministry, which denied executive officials, high or low, "a discretionary power . . . to search wherever their suspicions may chance to fall," Wilkes v. Wood, 19 Howell St. Tr. 1153, 1167 (1763) (summing up by Chief Justice Pratt, later Lord Camden). Both the English and the American history underlying the Fourth Amendment is eloquent with concern against the lodging of an uncontrolled, discretionary seizure power in the executive -- "a power that," in Otis' words, "places the liberty of every man in the hands of every petty officer." Otis' argument against the writs of assistance, as reported in Adams' abstract, 2 L. WROTH & H. ZOBEL (eds.), LEGAL PAPERS OF JOHN ADAMS 141-142 (1965). See, e.g., Stanford v. Texas, 379 U.S. 476, 481-486 (1965); Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 366, 396, 411-412, 450-451 n. 168 (1974).

U.S. 752, 762 (1969). 55/ And when policemen act within one of the "jealously and carefully drawn" exceptions to the warrant requirement, 56/ their actions must be justified by "facts . . . judged against an objective standard," Terry v. Ohio, 392 U.S. 1, 21 (1968), because "[t]he scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances," ibid. See also Beck v. Ohio, 379 U.S. 89, 93-97 (1964). But by far the overwhelming preponderance of police actions that constitute "searches" and "seizures" in a constitutional sense 57/ will never be scrutinized by any court, because

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55/ See also United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 309-310, 315-318 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 454-455, 474-482 (1971); Vale v. Louisiana, 399 U.S. 30, 34-35 (1970); Mancusi v. DeForte, 392 U.S. 364, 370 (1968); Katz v. United States, 389 U.S. 347, 356-357 (1967); Camara v. Municipal Court, 387 U.S. 523, 528-529 (1967); Stoner v. California, 376 U.S. 483, 486 (1964); Preston v. United States, 376 U.S. 364, 367 (1964); Chapman v. United States, 365 U.S. 610, 613-615 (1961); United States v. Jeffers, 342 U.S. 48, 51 (1951); Agnello v. United States, 269 U.S. 20, 32 (1925).

56/ Jones v. United States, 357 U.S. 493, 499 (1958).

57/ See note 53 supra.

(a) they are taken in the first instance without a warrant, 58/ (b) they produce no evidentiary consequences that call the exclusionary rule into play 59/ -- or, indeed, any consequences that feed into the criminal justice system in any way 60/ --, and (c) they are unamenable to judicial review in a civil lawsuit

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58/ See, e.g., W. LAFAVE, ARREST -- THE DECISION TO TAKE A SUSPECT INTO CUSTODY 15-30, 51-52, 377 (1965) [hereafter cited as LAFAVE]; T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 47-49 (1969); TIFFANY, McINTYRE & ROTENBERG 99-199; LaFave, Improving Police Performance Through the Exclusionary Rule, 30 MO. L. REV. 391, 411 (1965); LaFave & Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 MICH. L. REV. 987, 991-992 (1965); Note, Philadelphia Police Practice and the Law of Arrest, 100 U. PA. L. REV. 1182, 1183-1184 (1952).

59/ See, e.g., Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N.Y.U. L. REV. 785, 787-788 (1970); Goldstein, Administrative Problems in Controling [sic] the Exercise of Police Authority, 58 J. CRIM. L., CRIM. & POL. SCI. 160, 168 (1967) (quoted in note 38 supra); LaFave & Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 MICH. L. REV. 987, 1008-1011 (1965); Oaks, 720-723.

60/ See, e.g., LAFAVE 437-489; Foote, Safeguards in the Law of Arrest, 52 NW. U. L. REV. 16, 25 (1957); LaFave, Improving Police Performance Through the Exclusionary Rule, 30 MO. L. REV. 391, 421-458 (1965).

against the officer because of all the universally acknowledged limitations of such civil lawsuits. 61/ The upshot

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61/ These limitations have been noted so frequently and so invariably that we shall do no more than summarize them here:

(1) Victims of police abuse are ordinarily marginal and vulnerable individuals who are happy enough to escape from the clutches of the police after an incident of abuse has ended, and who cannot (and wisely should not) conceive of increasing their own visibility to the police and thereby risking recriminations by pursuing judicial remedies against an offending officer. In addition, they are too often wholly ignorant of their legal rights and conditioned to the view that they have no legal rights against the police -- that they "can't fight city hall."

(2) These same victims are almost always impecunious and cannot pay a lawyer to sue policemen. They can obtain legal assistance, therefore, only either from one of the very, very few attorneys who has the interest, time and resources to handle police-abuse cases without hope of any compensation (see Alyeska Pipeline Service Co. v. Wilderness Society, 43 U.S.L.W. 4561 (U.S., May 12, 1975)), or from an attorney who is attracted to the case by the possibility of a contingent fee. We believe that we are in a somewhat better position than the petitioners (see Brief for Petitioners, pp. 40-41 and n. 41) to inform the Court about the available resources of civil-rights organizations and similar groups to provide unpaid legal

is that the Fourth Amendment would be

61/ continued

assistance to victims of police abuse; and we can emphatically represent that those resources are puny under the best of circumstances and are strained to nonexistence in localities where inadequate police departmental control mechanisms result in the flourishing of episodes of abuse. As for the contingent fee (see Brief for Petitioners, p. 40), a little realism is in order. We ask this Court to review separately each of the specific incidents of Philadelphia police action described by the findings of the District Court here, 357 F. Supp. at 1294-1316, and consider whether, in any of them, the prospect of a contingent fee would have the remotest, vaguest possibility of attracting an attorney who practices law for a living in Philadelphia or any other urban center. Not only would the chance of successful litigation be pitiably small (see infra) and the amounts of money damages collectible be smaller still, but suits against policemen are notoriously time-consuming and difficult to try, and the attorney who brings them thereby sacrifices the good will of local police officers and agencies which is of inestimable value to many small practitioners for obvious reasons. See Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N.Y.U. L. REV. 785, 787 (1970).

(3) If a putative police-abuse plaintiff does muster the temerity and the legal resources to sue, he finds juries notably unsympathetic to him inasmuch as he is seldom a pillar of community

rendered nugatory in the major

61/ continued

virtues. (To put this point in perspective by an example, it should be recalled that many insurance companies flatly refuse to issue even automobile liability insurance to unmarried women with male roommates, upon the stated ground that this socially unacceptable relationship makes the women anathema to juries in the event of suit). On the other hand, most juries are highly sympathetic to police defendants.

(4) Various legal rules shield policemen from monetary liability, including the rule of qualified immunity recognized in Wood v. Strickland, 43 U.S.L.W. 4293 (U.S., February 25, 1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); and Pierson v. Ray, 386 U.S. 547 (1967). The purpose of this latter rule is to relieve police decision-making from the inhibiting fear that a policeman will be amerced by damages whenever he makes a wrong decision and acts illegally. Its necessary result is to place heavy reliance upon other mechanisms than the civil damage action -- primarily, of course, intradepartmental corrective mechanisms (see pages 44-45, 53-56 infra) to control the police. For surely there must be some corrective when policemen make wrong decisions and act illegally; and to the extent that qualified immunity forecloses a judicial forum in these cases, some other forum has to be provided for the constant examination and review of police actions that may be wrong and illegal. Otherwise the very concepts that there are right and wrong decisions in the application of constitutional con-

part of its intended restraints if,

61/ continued

straints upon police action, and that those constraints do define differences between legal and illegal police action, disappear, and qualified immunity supplants constitutional legality as the operative code of police performance.

(5) Various practical realities also shield policemen from monetary liability, including the understandable tendency of fellow officers having knowledge of an illegal police action to "close ranks" around the offender and protect him from any extra-police agency, and the fact that the officers in this protective phalanx -- not to speak of the offender himself -- are professionally trained and experienced evidence-gatherers and testifiers.

(6) Policemen are infrequently sufficiently solvent to make suing them worthwhile or to make recoveries against them collectable.

Little wonder, then, that civil damage actions against police officers who act unlawfully are everywhere acknowledged to be ineffectual as a realistic means of confining police behavior within the limits set upon it by the Constitution. See, e.g., Elkins v. United States, 364 U.S. 206, 217-220 (1960); Mapp v. Ohio, 367 U.S. 643, 651-653 (1961); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 421-422 (1971)(dissenting opinion of Mr. Chief Justice Burger); NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, FINAL REPORT: TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRAN-

as petitioners incredibly suggest, its enforcement were the exclusive province of the courts. 62/ A rule which thus says that policemen may do anything they please so long as they are not haled before a court and found to have violated the Fourth Amendment is a rule that starts by confusing rights with remedies and ends by denying both.

61/ continued

QUILITY 146 (G.P.O. 1969); POLICE TASK FORCE REPORT 198-200; CHEVIGNY 248-266; LAFAVE 409-427, 486-487; SKOLNICK 223; Foote, Tort Remedies for Police Violations of Individual Rights, 39 MINN. L. REV. 493 (1955); Oaks 673-674; Paulsen, Safeguards in the Law of Search and Seizure, 52 NW. U. L. REV. 65, 72-73 (1957); Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives, 2 J. LEGAL STUDIES 243, 269-272 (1973); Note, Philadelphia Police Practice and the Law of Arrest, 100 U. PA. L. REV. 1182, 1208-1209 (1952). Little wonder also that petitioners have supplied the Court with no empirical foundation for their blithe assertion that "[i]n every single instance of abuse by individual policemen enumerated by the Court below, the legal remedies provided by the Civil Rights Act would have more than adequately compensated the complainants." (Brief for Petitioners, p. 43; see generally id. at 39-44). There simply is none.

62/ Brief for Petitioners, pp. 38-44.

The purpose and command of the Fourth Amendment is not primarily that courts should exclude illegally seized evidence or award damages to the victims of illegal searches and seizures, but that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" in the first place. "'It would be a grotesque irony if our courts protect only against the unlawful search which actually uncovers contraband (by the exclusionary rule), while offering no relief against an admittedly unlawful pattern and practice affecting hundreds of innocent . . . [citizens].'" Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966). And the only effective relief against patterns and practices of police illegality that are spawned by policy discontrol is to insist that police officials end the discontrol and curb the illegality.

> "[P]rimary dependence for the control of police conduct must, under any conditions, continue to be placed upon existing systems of internal discipline. An agency functioning outside a police department simply does not have the capacity to substitute for the numerous echelons of supervisory officers that are required around the clock, twenty-four hours a day, to provide the kind of on-the-spot direction and control that is necessary to assure conformity by hundreds and sometimes thousands of police officers to established

> standards of conduct. External controls are likely to be effective only if they induce a desire and willingness on the part of police administrators and their supervisors to elicit conformity from their subordinates." (Goldstein, Administrative Problems in Controling [sic] the Exercise of Police Authority, 58 J. CRIM. L., CRIM. & POL. SCI . 160, 161-162 (1967).)

Elementally, a police department that fails to maintain adequate internal controls over its officers thereby empowers and licenses them to act uncontrollably, in plain violation of the command of the Fourth Amendment which forbids any regime of police power that "places the liberty of every man in the hands of every petty officer." 63/ 64/

63/ This passage from Otis' argument against the writs of assistance is quoted more fully in note 54 supra. See also Stanford v. Texas, 379 U.S. 476, 481 (1965).

64/ The point made in this subsection of the brief parallels that made in Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 414-428 (1974), although the two are not the same. The article urges recognition of a Fourth Amendment requirement that police search-and-seizure activity be suitably regulated by substantive police departmental rules adequate to confine and guide individual policemen in their conduct of field operations, whereas our concern in this brief is with the regularity of remedial or corrective

64/ continued

mechanisms within police departments necessary to assure against the perserverance of lawless searches and seizures. The common theme of the two contentions is that in modern-day police departments, which despatch hundreds or thousands of subordinate officers into the field with vast discretionary powers to search and seize, regular and orderly administrative procedures for the governance of that discretion are an indispensable component of constitutional security of the people "against unreasonable searches and seizures."

III. THE PROPER REMEDY

Police discontrol is therefore a matter of federal constitutional concern, not merely a question of "the wisdom or competence of executive administration." 65/ Faced with a flagrant demonstration of police discontrol such as that depicted by this record, a federal district court invested by Congress with jurisdiction to redress "the deprivation of any rights . . . secured by the Constitution" 66/ might respond in one of three essential ways. 67/

65/ Brief for Petitioners, p. 15. Petitioners' repeated assertions that the courts below decreed relief upon "a theory of administrative inefficiency or inadequacy" rather than "on the basis of constitutional infirmity," Brief for Petitioners, p. 18; see also id. at 20-21, 44, is belied by even the most cursory reading of the opinion of either court. Both specifically found the administrative procedures of the Philadelphia Police Department inadequate to prevent the recurrence of federal constitutional violations. See, e.g., 357 F. Supp. at 1318, 1321; 506 F.2d 547-548.

66/ Rev. Stat. §1979 (1875), 42 U.S.C. §1983 (1970).

67/ This is plainly not a case where abstention is permissible, see Kusper v. Pontikes, 414 U.S. 51, 54-55 (1973); and the exercise of federal jurisdiction may not, of course, be deferred here pending exhaustion of state remedies, see, e.g., Allee v. Medrano, 416 U.S. 802, 814 (1974).

First, it might do nothing. That is the response which petitioners ask this Court to hold is the only permissible one, 68/ even though it leaves a permeating pattern of acknowledged federal constitutional violations unremedied. Such would be its indisputable effect because the other "remedies" 69/ which petitioners characterize as "adequate" 70/ are a snare and a delusion. Civil damage actions 71/ are woefully ineffectual to halt proliferating police misconduct; 72/ criminal prosecutions of the offending officers 73/ are worse than ineffectual; 74/ and it strains both

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68/ Petitioners ask this Court to reverse an exercise of the broad remedial discretion of the District Court (see pages 58-60 infra) which has been affirmed by the Court of Appeals upon a record showing extensive police lawlessness and continuing toleration of that lawlessness by police supervisory personnel. If the Court does so, it is difficult to imagine any situation in which a federal district court could decree relief for police discontrol.

69/ Brief for Petitioners, p. 40.

70/ Brief for Petitioners, p. 43. See generally id. at 39-44.

71/ See Brief for Petitioners, pp. 40-43.

72/ See note 61 supra. The District Court so found at 357 F. Supp. at 1319.

73/ See Brief for Petitioners, p. 40 n. 22.

74/ See, e.g., COMMITTEE FOR ECONOMIC DEVELOPMENT, REDUCING CRIME AND ASSURING JUSTICE 37 (1972); LAFAVE 425-427; Schwartz, Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office, 118 U. PA. L. REV. 1023 (1970). The District Court so found at 357 F. Supp. at 1319-1320.

credibility and law to suggest 75/ that municipal politics contains the solution to the problem. 76/

We submit that it would be derelict and unconscionable for a constitutional court of equity to do nothing in these circumstances. "'[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.'" Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 392 (1971), quoting Bell v. Hood, 327 U.S. 678, 684 (1946).

It is much too late in the day for new "hands off" doctrines that entirely insulate enclaves of state official activity from the "varied avenues of relief . . . for vindication of . . .

75/ See Brief for Petitioners, pp. 20-21 and n. 15.

76/ Federal constitutional rights "may not be submitted to vote; they depend on the outcome of no elections." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943). See also Monroe v. Pape, 365 U.S. 167, 182-183 (1961).

Municipal politics finally terminated Philadelphia's brief experience with a civilian review board. See 357 F. Supp. at 1294. While such a board might indeed provide a constructive alternative to intradepartmental regulatory mechanisms, see Burger, Who Will Watch the Watchman?, 14 AMERICAN U. L. REV. 1 (1964); AMERICAN CIVIL LIBERTIES UNION, POLICE POWER AND CITIZENS' RIGHTS (1967), we do not understand petitioners to contend that this is what the courts below should have ordered.

federal rights" 77/ which alone can make the Constitution an instrument of living government instead of an embittering package of unkept promises. 78/ See, e.g., Breed v. Jones, 43 U.S.L.W. 4644, 4647 (U.S. May 27, 1975); Goss v. Lopez, 419 U.S. 565 (1975); Wolff v. McDonnell, 418 U.S. 539 (1974); Terry v. Ohio, 392 U.S. 1 (1968); Camara v. Municipal Court, 387 U.S. 523 (1967); Bond v. Floyd, 385 U.S. 116 (1966). The teaching of all these cases is that the accommodations of a wise federalism are to be made by acknowledging legitimate state interests in the contents of federal constitutional doctrine 79/ and the flexibility of federal remedies 80/ -- not by walling off preserves of arbitrary state action and declaring them wholly unaccountable to constitutional correction. Police misconduct, particularly, has never been thus walled off. See, e.g., Hague v. C.I.O., 307 U.S. 496 (1939). "Where, as here, there is a persistent pattern of police misconduct, injunctive relief is appropriate." Allee v. Medrano, 416 U.S. 802, 815 (1974).

No other rule can be admitted if the "basic guarantees of our Constitution are [to be] warrants for the here and now." 81/ This is Congress' judgment, made a century ago. See Rev. Stat. §1979 (1875), 42 U.S.C. §1983 (1970); Monroe v. Pape, 365 U.S. 167, 172-183 (1961).

77/ Johnson v. Mississippi, 43 U.S.L.W. 4553, 4558 (U.S., May 12, 1975)

78/ See Lankford v. Gelston, 364 F.2d 197, 204 (4th Cir. 1966).

79/ See, e.g., Wolff v. McDonnell, 418 U.S. 539, 560-563 (1974).

80/ See, e.g., Lemon v. Kurtzman, 411 U.S. 192 (1973).

81/ Watson v. City of Memphis, 373 U.S. 526, 533 (1963).

> "In . . . expanding federal judicial power [by this enactment], Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his Federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, ' . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ,' . . . .
> 'We yet like to believe that wherever the federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.' . . . ."
> (Zwickler v. Koota, 389 U.S. 241, 248 (1967). Accord: Steffel v. Thompson, 415 U.S. 452 (1974).)

A fortiorari, where no other forum can provide effective remedies for recurring federal constitutional violations, a federal district court should not refuse relief.

Second, a federal district court confronted with a record of police discontrol might undertake to restore control by establishing its own governance over affected

sectors of police behavior through a mandatory or prohibitory injunction. No doubt such relief is appropriate in some cases. 82/ But its intrusive quality makes it a remedy of last resort, particularly where the police discontrol is so pervasive that its correction would involve the district court in "continuous or piecemeal interruption" of police operations in the course of "an ongoing federal audit." O'Shea v. Littleton, 414 U.S. 488, 500 (1974). Certainly the District Judge in these cases, cognizant of the wide-ranging but random and haphazard pattern of police illegality in Philadelphia, could properly conclude that the assumption of direct court control over a necessary spectrum of Philadelphia Police Department activities would be unworkable: -- that it might merely draw the court into continuing rounds of hearings as new federal constitutional violations were expectably reported during the life of any injunction, while simultaneously failing to correct many instances of police lawlessness that could not practicably be brought to the court's attention because of their low visibility.

Third, the district court could forthrightly address the source of the problem, and -- without embroiling itself in the business of operational police management -- order the police

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82/ See, e.g., Cottonreader v. Johnson, 252 F. Supp. 492 (M.D. Ala. 1966); United States v. City of Grenada, 11 Race Rel. L. Rep. 1782 (N.D. Miss. 1966); Cunningham v. Grenada School District, 11 Race Rel. L. Rep. 1776 (N.D. Miss. 1966); Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965); Hicks v. Knight, 10 Race Rel. L. Rep. 1504 (E.D. La. 1965).

department to control its own officers in a manner that is likely to provide sufficient protection against the recurrence of constitutional violations. This approach does not involve judicial supersession of police administrative authority, but it necessarily does involve a judicial analysis and appraisal of the police department's internal control procedures in order to assure that those procedures are effectual to furnish the necessary degree of control. Such analysis and appraisal is a commonplace of constitutional litigation in many contexts. E.g., Younger v. Gilmore, 404 U.S. 15 (1971), aff'g Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970); North Carolina v. Pearce, 395 U.S. 711 (1969); Green v. County School Board, 391 U.S. 430 (1968). So is the implementing practice, in injunctive actions, of requiring state administrative officials to submit plans of operation and procedure for the federal district court's evaluation and approval. E.g., Procunier v. Martinez, 416 U.S. 396 (1974); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968). The District Court below did nothing more or less in these cases, and what it did was eminently proper.

Surely the court stood on sound ground in concluding that "revision of procedures for handling civilian complaints is a necessary first step in attempting to prevent future abuses," 357 F. Supp. at 1321, like those which it found to have flourished under "the existing procedures, or lack of procedures" of the Philadelphia Police Department, id. at 1320. See pages 7-9 supra. In the universal opinion of those who have studied the problem of controlling excesses and abuses of police power, ade-

quate citizen-complaint mechanisms are an indispensable safeguard against official lawlessness. See, e.g., NATIONAL CRIME COMMISSION REPORT 102-103, 115-116; POLICE TASK FORCE REPORT 29, 193-197; NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 162-163 (G.P.O. 1968); NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, FINAL REPORT: TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY 145-147 (G.P.O. 1969); A.B.A. STANDARDS 163-167; COMMITTEE FOR ECONOMIC DEVELOPMENT, REDUCING CRIME AND ASSURING JUSTICE 36 (1972); SAN FRANCISCO COMMITTEE ON CRIME, REPORT: SAN FRANCISCO POLICE DEPARTMENT 91 (Western Star Press ed. 1971); Note, Grievance Response Mechanisms for Police Misconduct, 55 VA. L. REV. 909 (1969); Note, The Administration of Complaints by Civilians Against the Police, 77 HARV. L. REV. 499 (1964). As all of these studies attest, adequate complaint mechanisms manifestly are not "counter-productive [sic] to the Department's primary mission to prevent and detect crime . . . [or] inimical to the public interest." 83/ Rather, the efficiency of law enforcement is enhanced by procedures which assure that brutal, arbitrary or lawless police actions are called to account and corrected by police management. 84/ Any other view reflects extreme

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83/ Brief for Petitioners, p. 15.

84/ "The institution of an effective external complaint procedure is not a tactic designed to limit an agency's legitimate activities. Quite the contrary, an effective and properly administered external complaint procedure can be beneficial for the public, the officer,

short-sightedness regarding both the "mission" of the police and the importance

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84/ continued

and the agency. It reassures the general public that the police agency respects the rights of citizens and corrects inappropriate behavior. If utilized properly, the complaint process is an asset to the police officer because it assures him that if he conducts himself in a proper manner he will be protected from unwarranted criticism and discipline.

"As a management technique, it is a cogent device to measure the validity of certain policy and procedural statements. Properly utilized, the complaint process serves management by providing statistical evidence of any conflict which exists between the community and the department's policies and procedures. Similarly, continuing evidence of conflicts between individual officers and citizens is a useful indication of emotional problems affecting a particular officer or an indication that a particular policy may not have been well understood by all officers, whether because of poor communications or ineffective training." ([CALIFORNIA] ATTORNEY GENERAL'S ADVISORY COMMISSION ON COMMUNITY-POLICE RELATIONS, REPORT: THE POLICE IN THE CALIFORNIA COMMUNITY 9-6 - 9-7 (March 31, 1973).) See also CRIMINAL JUSTICE STANDARDS REPORT 469-491.

of constitutional values in the social order which the police are sworn to preserve. 85/

85/ Pages 29-35 of the Brief of Petitioners enumerate the various ways in which citizen-complaint procedures will purportedly interfere with the police mission to fight crime. All are highly speculative. Two courts below, both duly solicitous of the vital functions of the police (see, 357 F. Supp. at 1317; 506 F.2d at 547), were unconvinced that these procedures would hinder lawful police activities. As the Court of Appeals noted, "the procedures which the district court required be implemented by the police department for the receipt, investigation, and disposition of civilian complaints are fully in accord with the American Bar Association Standards Relating to the Urban Police Function, which were unanimously approved by the Executive Committee of the International Chiefs of Police in December, 1972." 506 F.2d at 548. We might also add that the "45 day limits" to which petitioners particularly object (Brief for Petitioners, p. 31; see also id. at 30) allow (a) one and a half times the period for processing complaints that is recommended by two other comprehensive studies of police disciplinary systems, see POLICE TASK FORCE REPORT 197; CRIMINAL JUSTICE STANDARDS REPORT 483, 486, and (b) relaxation "for extenuating circumstances stated in the file and approved by the Chief Inspector, Internal Affairs Bureau" (Appendix to Petition for Certiorari, p. 28a) -- a provision unaccountably omitted in petitioners' description and discussion of the District Court's decree. Footnote 85/ continued

Nor can the District Court be held in error for its specific findings and correctives of the deficiencies in the citizen-complaint procedures of the Philadelphia Police Department, which it summarized as follows:

> "(1) The departmental procedures are geared to handle infractions of police rules and regulations, yet these rules and regulations are not framed to cover specific violations of the legal and constitutional rights of civilians; (2) Complaints are handled on a 'chain of command' basis, and this results in a tendency to minimize and discourage citizen complaints; (3) The existing procedures do not provide adequate opportunity for the civilian complainant to present his case, before a relatively objective tribunal; and (4) The outcome of the proceeding is not disclosed." (357 F. Supp at 1320.)

85/ continued

At bottom, petitioners' objections to the District Court's decree are obviously based less upon concerns of practicability than upon a set of priorities that regards enforcement of the Constitution as trivial compared with enforcement of the criminal law. Fortunately, that view has been repudiated by Anglo-American courts ever since Lord Camden decided in Entick v. Carrington, 19 Howell St. Tr. 1029 (1765) that "[t]he mere need to solve crimes . . .

The first of these deficiencies (as petitioners frankly admit 86/) constitutes a total abnegation of the Department's responsibility to enforce constitutional restraints upon its officers' behavior, and is fatal for the reasons set forth in Part II of this brief. The remaining three deficiencies, singly and in Kafkaesque combination, render the Department's complaint procedures futile "to insure that administrators . . . , where fundamental constitutional rights may have been abridged, will act fairly," Wolff v. McDonnell, 418 U.S. 539, 565 (1974), and were therefore correctible within the District Court's broad equitable discretion to "suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all the parties before them." Alexander v. Hillman, 296 U.S. 222, 239 (1935).

It is unclear to us whether petitioners now intend to make an independent attack upon the particular means which the District Court employed to correct these four deficiencies. Such an attack

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85/ continued

did not allow the law to place its own enforcement above other values." J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 59-60 (Johns Hopkins University Studies in Historical and Political Science, Ser. 84, No. 1, 1966). See Note 7 supra.

86/ Brief for Petitioners, p. 38-39.

is plainly not contemplated by the Questions Presented on page 4 of the petition for certiorari on page 3 of petitioners' brief; and petitioners' several quarrels with the details of the "procedures proposed by the District Court [to] govern the investigation of . . . complaints" 87/ appear to be introduced into their brief not so much to invite this Court's review of the specifics as to exemplify the supposed unwisdom of any sort of federal judicial intervention into Philadelphia Police Department affairs. In any event, an attack upon the specifics of the proposed Police Directive attached as Appendix A to the final judgment of the District Court would be improvident, both because that judgment requires only that the Police Department "promulgate as an intra-departmental directive procedures for the receipt, investigation and disposition of civilian complaints of police misconduct, substantially in the form of the procedures attached to this Order as Appendix 'A'" (Appendix to Petition for Certiorari, p. 20a, emphasis added), and because the procedures described in the proposed directive are well within the remedial discretion of the District Court. 88/

87/ Brief for Petitioners, p. 29. See generally id. at 29-35.

88/ "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971). See also, e.g., United States v. Loew's Inc., 371 U.S. U.S. 38, 52-53 (1962); United States v. United States Gypsum Co., 340 U.S.

CONCLUSION

There is no war between constitutional liberties and the role of the police in a democratic society. Rather, police discontrol and the lawlessness which it spawns are at war with both the Constitution and efficiency in law enforcement The Court of Appeals below was plainly right in concluding that police control "must be maintained because of the tremendous importance of police work to

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88/ continued

76, 88-89 (1950), and cases cited. When matters of importance affecting the public generally are involved, "'those equitable powers assume an even broader and more flexible character . . .'" Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291 (1960). The exercise of these broad powers is committed to the sound discretion of the district court: "[t]he essence of the equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case," Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). See also Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946). Accordingly, "[i]n shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondinly narrow," Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (plurality opinion of Mr. Chief Justice Burger), particularly "in cases turning on peculiarly local conditions and circumstances," Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 621 n. 20 (1974).

the maintenance of an orderly society without which no rights can survive." 89/ And, on this record, "[t]he grave character of the department's conduct places a strong obligation on the courts to make sure that similar conduct will not recur." 90/

The judgment below should be affirmed.

Respectfully submitted,

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89/ 506 F.2d at 547, emphasis added.

90/ Lankford v. Gelston, 364 F.2d 197, 203 (4th Cir. 1966).